REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 533 OF 2006

IN THE MATTER OF THE ESTATE OF JAMES KAMAU KAGIRI - DECEASED

SIMON NJENGA KAMAU.....1ST PETITIONER/RESPONDENT

DOUGLAS WAINAINA KAMAU.....2ND PETITIONER/RESPONDENT

JANE WANJIRU KAMAU.....3RD PETITIONER/RESPONDENT

VERSUS

STEPHEN KUNG'U KAMAU.....1ST PROTESTOR/APPLICANT

ELIZABETH NYAMBURA KAMAU.....2ND PROTESTOR/APPLICANT

RULING

1. A faithful rendering of the history of this case and litigation easily resolves the matter at hand. Such history illuminates the equities of the case with unusual intensity.

2. The Deceased herein – James Kamau Kagiri – died intestate on 10/09/2004. He was a polygamous man. His first wife had predeceased him. He was survived by one widow; six children from the first house; and three from the second house.

3. In the succession cause that was filed to distribute the assets of the Deceased, the Applicants herein – Stephen Kung'u Kamau and his sister -- were hold-outs: while the rest of the family proposed that all the assets of the Deceased were to be distributed equally as per the provisions of the Law of Succession Act, the Applicants insisted that the majority of the estate be bequeathed to the 1st Applicant. The reasoning was that the Deceased had allegedly gifted the 1st Applicant during his lifetime.

4. The case dragged through the Courts from 2006. In 2019, the Learned Justice A. Ndung'u heard all the parties in *viva voce* hearing and gave a judgment dated 20/11/2019 in which he rejected the Applicants' claims that there was any inter vivos transfer of the Deceased's assets to the 1st Applicant. The Learned Judge proceeded to distribute the assets according to the formula posited in the Law of Succession Act.

5. The Applicants were dissatisfied by the Learned Judge's judgment. They filed a Notice of Appeal on 06/12/2019. From the Court file records, no other action has been taken to advance the appeal.

6. Meanwhile, the Respondents extracted the Certificate of Confirmation of Grant and attempted to execute it as per the terms of the judgment dated 06/12/2019. They faced seemingly immutable resistance from the Applicants and various tenants who have rented properties through them. In short, despite the terms of the judgment dated 06/12/2019, the Applicants were simply unwilling to move from the properties allocated to the other heirs of the Deceased. Other than filing a Notice of Appeal against the judgment, however, the Applicants did nothing else.

7. After two ill-fated injunction applications, the Respondents eventually filed two functionally identical applications seeking the eviction of the Applicants from the parcels known as Nakuru/Municipality Block 1/1618 and Nakuru/Municipality Block 27/324 as well as Plot No. 386 Pangani Estate and Nakuru Municipality Block 1/660. Those applications are dated 09/11/2020 and 27/11/2020. After the Applications were filed, the case was scheduled for directions on 10/11/2020. On that day, Ms. Amulabu appeared and held brief for Mr. Otieno for the present Applicants. Ms. Amulabu confirmed that she had been served with the two Applications. Hearing of both Applications was scheduled for 15/12/2020 – more than a month away.

8. On 15/12/2020, Ms. Amulabu was, again, present for the Applicants. She attempted to get an adjournment saying that she needed four

days to file a response by the present Applicants. Tasked by the Court to explain what the response would press, Ms. Amulabu said that it would simply make the point that execution should not happen while there is an appeal pending.

9. Given the situation, the Court was of the view that it made little sense to grant the Applicants more time to file a response anyway. The Court, having been satisfied that the Applicants had been served as confirmed by their counsel, proceeded to allow the two Applications. In doing so, the Court noted that the two Applications merely sought to enforce the judgment dated 20/11/2019; and further that there was no stay pending appeal.

10. It with all this water under the bridge that the Applicants, now represented by new Counsel have brought the present Application. The Application is dated 01/02/2021. It contains the following prayers:

> *(a) That the Application herein be certified as urgent and be heard ex-parte at 1st instance.*
>
> *(b) That pending hearing and determination of this Application inter parties this honourable Court be pleased to stay execution of orders issued on the 15th December, 2020.*
>
> *(c) That this honourable Court be pleased to set aside, review and/or vary the orders issued on 15th December, 2020 and do grant leave to the Applicants herein to file their response to the Application dated 9th November, 2020 and 27th November, 2020.*
>
> *(d) That Pending hearing and determination of this Application inter partes this honourable Court be pleased to stay execution of the judgement and/or decree issued on 20th November, 2019 and read on 27th November, 2019.*
>
> *(e) That pending hearing and determination of the intended appeal this honourable Court be pleased to stay execution of the judgement and/or decree issued on 20th November, 2019 and read on 27th November, 2019.*
>
> (f) *That the costs of this Application be provided for*.

11. In essence, the Application is one to set aside the orders on the ground that they were issued *ex parte*. Only that they were not. The Applicants' legal representative who was on record was duly served and confirmed as such on record. An advocate from the firm attended Court both on the day directions were given as well as on the hearing date. On the re-scheduled date, she still had not filed a reply. The Court proceeded to give the orders as prayed. That is not an *ex parte* or default order. It is an *inter partes* order – duly made after both parties had turned up. There is, therefore, no basis for setting aside on account of non-service.

12. In any event, even if the orders had been issued *ex parte* or in default, for them to be set aside, one would have to test the credibility of the narrative by the Applicants that they did not know about the Application. The story told by the 1st Applicant here in his affidavit is, simply, incredulous. He says that his legal counsel did not inform him about the Applications. This is incredible because the 1st Applicant has been heavily involved in this litigation and had, in fact, filed a lengthy response to the two Applications which had earlier been withdrawn. It is also incredible because if this were the case we would have seen some evidence of action against the advocates who, they now claim, negligently failed to inform them about the Applications and hearing dates. They even go further to claim that the same advocates had negligently failed to file an Application for stay of execution for more than a year. I am simply not convinced by this narrative.

13. Even if I were persuaded by this improbably narrative, setting aside the orders of 15/12/2020 would be futile anyway. I say so because it would only return the Applicants to the status quo ante. As I said earlier, the two Applications which were allowed on 15/12/2020 were simply in the nature of enforcing the judgment of 20/11/2019. That judgment is still in force. No stay has ever been issued against that judgment.

14. The instant Application cleverly tries to go round this problem by including a prayer for stay of execution against the judgment of 20/11/2019. As the Applicants readily concede, that prayer is rendered still-born by the inordinate delay attending to it. It is coming close to two years since the judgment was delivered. While the Applicant timeously filed their Notice of Appeal, they did nothing to get stay of execution. The inordinateness of the delay is made more remarkable by the fact that the Applicants continued to litigate on post-judgment applications without finding the need to apply for stay of execution. They were only seemingly prompted to apply for the stay when the orders of 15/12/2020 were granted.

15. In the circumstances of this case, I would find this delay to be inexcusable. I simply do not believe that the Applicants' previous advocates were to blame for all of the Applicants' misfortunes. The Applicants had a duty to keep themselves abreast of what was happening in their matter – and it would appear that they, indeed, did so. It is, therefore, not credible for them to claim that they had thought that their previous lawyers had made an application for stay of execution.

16. The Courts, in interpreting Order 42, Rule 6, have required that an Applicant demonstrates four things in order to be entitled to a grant of an order for stay of judgment pending appeal:

> a. The appeal filed must be arguable;
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> b. The Applicant is likely to suffer substantial loss unless the order is made. Differently put, it must demonstrate that the appeal will be rendered nugatory if the stay is not granted;
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> c. The application was made without unreasonable delay; and

d. The Applicant has given or is willing to give such security as the Court may order for the due performance of the decree which may ultimately be binding on it.

17. In the present case, even if we accepted the other three elements are present, the requirement that an application for stay be made without inordinate delay is not satisfied. That deals a fatal blow to the Applicants' prayer for stay.

18. **In the end, therefore, the Application dated 01/02/2021 is one for dismissing in its entirety. I hereby do so. The Applicants must also pay the costs of the Application**.

19. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF OCTOBER, 2021

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.